92-74

In the Supreme Court of the United States

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Department of Revenue of the State of Oregon, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon,* No. 90-35402 (April 8, 1992).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *ACF Industries Inc., et al. v. Dept. of Revenue of the State of Oregon*, 961 F.2d 813 (1992), and is attached to this petition as Appendix A. The district court's opinion is unreported, and is attached to this petition as Appendix B.

JURISDICTION

The court of appeals' opinion was dated and filed on April 8, 1992. The judgment was entered the same day, and this petition is filed within 90 days. Jurisdiction to review the judgment by writ of certiorari is conferred upon the Court by 28 U.S.C. § 1254(1)(1982). The district court had jurisdiction over the claim in the first instance under the provisions of 49 U.S.C. § 11503(c).

STATUTES INVOLVED

49 U.S.C. § 11503, the Railroad Revitalization and Regulatory Reform Act of 1976, provides, in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail

transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"Commercial and industrial property" is defined in 49 U.S.C. § 11503(a)(4) as:

property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax.

The complete text of of 49 U.S.C. § 11503 is set out in Appendix C.

STATEMENT OF THE CASE

1. After 15 years of "intermittent and inconclusive legislative action," Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") to restore the financial stability of the railway system.[1] From the beginning, proponents of the legislation identified state taxation of railroads as an area for reform. Specifically, Congress was urged to provide relief that would equalize the position of railroads *vis-a-vis* other taxpayers in the same jurisdiction and *vis-a-vis* other interstate carriers.[2] Ultimately, as one small part of the massive 4R Act and as one of several means to achieve the Act's general goals, Congress enacted § 306 (now codified as § 11503) to address directly the problem of discriminatory state taxes.[3] *See generally Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457–59 (1987).

Under § 11503, Congress has declared that specific taxing acts "unreasonably burden and discriminate against interstate commerce" and that the States may not engage in any of those acts. For the most part, the prohibited acts are directed to rate and assessment discrimination in the States' ad valorem property tax schemes. Specifically, the section forbids States to assess property (both real and personal) at a higher fraction of fair market value than they assess other "commercial and industrial property" (§ 11503(b)(1)); to levy or collect a tax based on such an assessment (§ 11503(b)(2)); and to tax rail transportation

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[1] *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 (1987).

[2] *See Special Study Group on Transportation Policies in the United States*, S. Rep. No. 445, 87th Cong., 1st Sess. 463 (1961). This is often referred to as the "Doyle Report," and it proved to be the genesis for the 4R Act. The report recommended some form of an "antidiscrimination tax law."

[3] The provisions of original § 306 are set out in Appendix D. As this Court has observed, the language of § 306 was first codified at 49 U.S.C. § 26c. Congress altered the language slightly when the Act went into effect three years later (recodified as 49 U.S.C. § 11503). Congress specifically directed that any changes due to the recodification "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. Most lower courts, accordingly, have concluded that ambiguities in the provision should be resolved in favor of the original language. *See generally Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1568, n.1 (11th Cir. 1987)(discussing cases). This Court, too, has suggested that the original language should be controlling. *See Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. at 459 n.1. *But see Arizona v. Atchison, Topeka & S.F. R. Co.*, 656 F.2d 398, 404 (9th Cir. 1981)(rejecting that approach where original language was dropped from recodification on theory that original language never became law and therefore cannot be construed).

property a higher rate than other "commercial and industrial property" (§ 11503(b)(3)). "Commercial and industrial property" thus forms the comparison class for purposes of testing ad valorem property taxes for rate or assessment discrimination. The class includes all property, except land used primarily for agricultural purposes or for growing timber, that is devoted to commercial and industrial uses and that is "subject to a property tax levy." § 11503(a)(4). A fourth and final provision of the Act prohibits discriminatory taxes in a less specific way: it forbids the States from imposing "any other tax" that discriminates against a rail carrier. § 306(1)(d); § 11503(b)(4). This subsection, unlike the others, does not specify what types of property or other taxes are to be compared in testing whether the treatment of railroad property is "discriminatory."[4]

2. The following description of Oregon's property tax system is taken largely from the Ninth Circuit's opinion and accurately describes its essential features. All real and personal property in Oregon, except property expressly exempted, is subject to ad valorem taxation and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. § 307.030 (1987). All personal property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1987). Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1987).

Certain classes of business personalty are exempt from ad valorem taxation, including agricultural machinery and equip-

[4] The original language of § 306 forbade the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter." § 306(1)(d). The recodified language changed the reference to "any other tax" and it became "another tax." We consistently refer to the language from § 306 ("any other tax"). *See* fn.3, *infra*.

ment, business inventories, livestock, poultry, bees, fur-bearing animals and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.325, 307.400 (1987). Motor vehicles are exempt from personal property taxation but are subject to fixed registration fees in lieu of property taxes. Or. Rev. Stat. § 803.585 (1987). Standing timber is also expressly exempt from ad valorem taxation, but it is taxed under a separate scheme when it is harvested. Or. Rev. Stat. §§ 307.010(1)(1987), 321.005 *et seq.* (1987).

3. Plaintiffs are a group of eight corporations, commonly known as "carlines," which are in the business of leasing railroad cars to railroad carriers. Carlines' property, both real and personal, is within the definition of "transportation property" that is subject to the protection of the 4R Act. The plaintiff carlines brought this action pursuant to the 4R Act seeking a declaration that Oregon's property tax scheme unlawfully discriminates against them because it exempts some categories of personal property (*e.g.*, business inventory and standing timber) without extending exemptions to the categories of personal property held by carlines. Carlines sought to enjoin Oregon from collecting any property taxes on their personal property. In pursuing their claim, carlines did not rely on subsections (b)(1)-(3), which are directed by their terms to discriminatory ad valorem property taxation. They sought relief instead under subsection (b)(4), the general provision prohibiting "any other tax" that discriminates against a rail carrier.[5]

[5] At the district court level, the State disputed whether carlines qualified as "rail carriers" and thus had standing under subsection (b)(4) to challenge the State's taxes as discriminatory. The district court resolved that issue in favor of carlines and it may be considered settled for purposes of review at this level.

4. The district court entered judgment for the State after concluding that carlines did not meet their burden to show that Oregon's tax on railroads is discriminatory. The trial court characterized carlines' challenge as a claim that Oregon's exemptions (as opposed to its tax rates or assessments) discriminate against railroads. (App-31). In addressing that claim, the court canvassed analogous cases from other jurisdictions involving exemptions that are neutral in application and not directed to any particular class of taxpayer, but that instead exempt classes of property that the railroads do not happen to own. (App-29–31). The district court concluded that Oregon's system of exemptions similarly is neutral in application. (App-32). In reaching that conclusion, the court suggested that at some point a State's system of property tax exemptions might become "discriminatory" by exempting most classes of personal property while taxing classes of property typically owned only by railroads. (*See* App-32). The trial court held, however, that Oregon's tax system did not approach that critical threshold. *Ibid.*

5. The Ninth Circuit reversed. The court first concluded that the sections of the 4R Act that expressly address ad valorem taxes were irrelevant to carlines' challenge. (App-9–13). Under those sections, railroads may compare the tax treatment of their property only to the treatment of commercial and industrial property that is "subject to a property tax levy." As a result, wholly exempt property is outside the comparison class. The Ninth Circuit held, however, that by casting their claim as one directed to "discriminatory exemptions" rather than to discriminatory assessment ratios or rates, the carlines could bring their suit under § 11503(b)(4)(prohibiting "any other tax" that discriminates against rail carriers). Under that section, the Ninth Circuit observed, Congress did not limit the comparison class to

"commercial and industrial property." Accordingly, the court held that exempt property may freely "enter the equation" in testing a state's property tax for discriminatory treatment of railroads. (App-15–16).

The Ninth Circuit rejected, *sub silentio*, the district court's reliance on the neutrality of Oregon's exemptions. The appellate court implicitly deemed it irrelevant that Oregon exempts classes of property, some of which railroads may or may not own (*e.g.*, motor vehicles, inventory held for sale), rather than classes of taxpayer (*e.g.*, timber land owned by mills versus that owned by railroads). The Ninth Circuit found that at least 25% of all real and personal property in Oregon is tax-exempt. (App-18). The court, however, expressly disagreed with the district court's analysis that a State's property tax exemptions are not "discriminatory" unless the percentage of exempt property is high enough to suggest that railroads are targets of special taxation.[6] Instead, the court of appeals concluded that:

> [A]ny exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under section 306(1)(d).

(App-17).

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[6] The Ninth Circuit represented that the district court held and the State agreed that a 50% threshold should be used to determine the point at which the State's exemption system becomes "discriminatory." (App-16). That is an inaccurate interpretation of the State's position below: the State argued only that because total exemptions did not even approach a 50% level, any suggestion that Oregon's exemptions were discriminatory should not be entertained. Nor did district court adopt an absolute 50% threshold as a conclusive point to deem exemptions "discriminatory." The district court specifically declined to identify any single percentage as the test, and suggested instead that the question was whether the level of exemptions and the nature of the exemptions, alone or in combination, would support an inference that a State's tax was discriminatory. (App-32).

The court next turned to the question of remedy. The court declined to award the proportional relief that Congress provides under the ad valorem provisions of the Act. Under those subsections, railroads are entitled to have their tax rates or assessments adjusted to match the average tax on all commercial and industrial property in the jurisdiction. *See* discussion *infra* at p. 23-24. The Ninth Circuit held instead that carlines are entitled to the same total exemption "preferred property owners" enjoy. (App-19). The court enjoined Oregon's collection of any ad valorem tax on carlines' personal property. (App-19).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has announced a *per se* rule of discrimination that leads to an extraordinary encroachment on the States' authority to levy taxes. Under the Ninth Circuit's decision, a state property tax system that exempts *any* class of property not owned by a railroad without exempting *all* property held by that railroad is *per se* discriminatory within the meaning of the 4R Act. By virtue of the remedy the Ninth Circuit imposes, States necessarily are forced to one of two extreme positions: either they must restructure their property tax schemes to eliminate all property tax exemptions, or they must cease altogether to tax any property held by railroads.[7] The Ninth Circuit's decision permits no middle ground. In so holding, the court has overridden one of the significant compromises that Congress deliberately incorporated into § 11503 and has aggravated the developing conflict among lower courts that have grappled with the contours of the non-discrimination provisions of the 4R Act.

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[7] The plaintiff Carlines sought relief only from taxation on their personal property. The rationale of the Ninth Circuit's decision is not limited to personal property and other lawsuits already filed in Oregon urge that the Ninth Circuit's holding applies to real property as well. *See* fn. 34, *infra*.

I

The Ninth Circuit's *Per Se* Rule Contradicts Both the Language and the History of the Statute

The Ninth Circuit's holding is predicated on subsection (b)(4), which forbids imposition of "any other tax" that discriminates against a railroad. The court read the prohibition as sufficiently broad and unrestricted in its terms to permit railroads to attack any aspect of any state tax as discriminatory. That construction might be at least plausible if subsection (b)(4) stood in isolation or was the sole provision directed to discriminatory state taxation. The subsection, however, is part of a larger fabric in which Congress carefully protected the States' authority to fully exempt some property from taxation without rendering their taxation schemes "discriminatory" within the meaning of § 11503.

Congress's intent is unmistakably reflected in subsections (b)(1) and (b)(3), which address ad valorem taxation specifically. Those subsections prohibit states from discriminating against railroads in either of two ways: by assessing railroad property at a higher percentage of true cash value than the percentage applied to commercial and industrial property; or by imposing a higher tax rate on the assessed value of railroad property than is imposed on commercial and industrial property. Congress specially defined "commercial and industrial property" to limit the relevant comparison class:

> "[C]ommercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*.

49 U.S.C. § 11503(a)(4)(emphasis added).

One of the few areas in which lower courts interpreting § 11503 are in agreement is on the meaning of "subject to a property tax levy." Uniformly, they have concluded that the language means that railroads cannot base a claim of rate or assessment discrimination on a comparison that includes "exempt" property — that is, property a state does not tax at all. *See, e.g., Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1571-73 (11th Cir. 1987)(citing and discussing representative cases).[8] As the Ninth Circuit itself has held: "We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." *ACF Industries v. Arizona*, 714 F.2d 93, 94 (9th Cir. 1983); *accord Clinchfield Railroad v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986)(dictum); *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 512 (N.D. Cal. 1982).

Congress's decision to exclude tax-exempt property from the comparison class was a significant one. In most instances, incorporating tax-exempt property in the rate or assessment calculations would create a measurable gap between the average tax treatment of commercial and industrial property and the tax on railroad property. Property that is not subject to an ad valorem tax is the equivalent of property taxed at a zero rate. Including it in the calculation necessarily would reduce the average tax rate for the comparison class of property. Similarly, exempt property is the equivalent of property that is assessed at zero percent of true cash value. Again, including tax-exempt

[8] The Eleventh Circuit's discussion of the "subject to a property tax levy" language is particularly thorough. The court went on to conclude that a claim under subsection (b)(4) may include an examination of exempt property (*see* discussion *infra* at p. 20), a conclusion we do not necessarily endorse in relying on the first portion of the court's analysis.

property in the comparison class would demonstrably lower the average assessment ratio. In both cases, the result likely would be that few, if any, State taxes on railroad property would survive challenge under subsections (b)(1) and (b)(3).[9] Thus, for Congress to have included tax-exempt property in the formula would have proven largely outcome determinative.

The exclusion of tax-exempt property from the class of property to which railroads may compare themselves was a conscious choice on Congress's part. In the course of the bill's evolution, Congress narrowed the comparison class in three ways. Congress specified that the rates and assessments applied to railroad property had to be on a par with those applied to property devoted to "a commercial and industrial use." Congress also eliminated from the formula all real property used for agricultural purposes or timber growing.[10] More important for purposes of this case, Congress specified that railroads could compare their

[9] A hypothetical illustrates the point. Assume, for example, that a State taxes real and personal property at a uniform rate of 4% of true cash value. Assume further that all taxed property in the State is assessed at 100% of its true cash value. In a comparison class consisting only of property subject to ad valorem taxes, a claim of discrimination would necessarily fail because both the tax rate and tax assessments are absolutely uniform.

Both the calculation and the result change, however, when tax-exempt property is included in the comparison class. Assume that 25% of all property in the state is exempt from ad valorem taxes. Effectively, then, 25% of the jurisdiction's property is assessed at a zero ratio, the remaining 75% is assessed at 100% of true cash value, for an average assessment ratio of 75%. Similarly, because 25% of the property effectively has a zero tax rate while 75% has an effective tax rate of 4%, the average tax rate would be reduced to 3%. A railroad challenging such a scheme would automatically prevail on a claim of rate discrimination as well as on a claim of assessment discrimination, even though the railroad's property is taxed identically to all other taxed property in the jurisdiction.

[10] *E.g.*, H.R. 12891 (1974).

property tax rates and assessments only to those for business property "subject to a property tax levy."

This latter refinement emerged without explicit comment in the congressional reports on the bill. The legislative records reveal, however, an active controversy over whether tax-exempt property would be removed from the comparison class. The requirement that comparison property be "subject to a property tax levy" first appeared in an early version of the legislation in 1961.[11] It applied, however, only to the provisions for discriminatory assessments, not discriminatory tax rates. States responded to that omission by lobbying Congress, over the course of several years, to preserve their ability to exempt property from taxation.[12] Shortly before the Act's passage, a Conference Committee reconciled competing House and Senate versions of the tax provisions.[13] The Conference compromise, ultimately enacted into law, included the critical language "subject to a property tax levy" in the definition of commercial and industrial property, thus applying it to both the rate and assessment sections.[14] As with many of the controversies that have arisen under the Act,

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[11] *See* Doyle Report, *supra* at 465.

[12] *E.g.*, Hearings on S. 2289, Subcomm. on Surface Transp. of Senate Comm. on Commerce, 91st Cong., 1st Sess. 83, 86 (1969)(report of the Western States Assoc. of Tax Administrators); Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, S. 2289, Subcomm. on Transp. and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 90, 94 (1970)(Statement of Charles Otterman, Chief Counsel, Cal. State Bd. of Equalization); *Id.* at 113 (resolution of the Multistate Tax Commission); Hearings on S. 927, Subcomm. on Surface Transp. of the Senate Comm. of Commerce, 90th Cong., 1st Sess. 116 (1967)(letter from F.H.W. Hofeke, Chairman, Oregon State Tax Comm.).

[13] *Compare* S. 2718 (1975)(applying "subject to a property tax levy" exclusion to both rate and assessment provisions) *with* H.R. 10979 (1975)(applying same exclusion only to rate provision).

[14] S. Rep. No. 959, 94th Cong., 2d Sess., 27–28 (1976).

there is no direct legislative history to explain Congress's choice of language or the reasons for it.[15] Committee testimony and official commentary is hardly necessary, however, because the change Congress made speaks unequivocally for itself.

The railroad industry in general, and carlines in this case, have been unable to find any persuasive counter to the statute's plain language. For the most part, they have been left to argue that construing the statute in this way is illogical because it would mean that state taxes would be tested when they are very low (*i.e.*, .0005 of value) but not when they fall all the way to zero (*i.e.*, tax exempt). They suggest that States, rather than reduce taxes on favored industries, will use exemptions to circumvent the statute and leave only the railroads subject to taxation.

Despite its possible surface appeal, that speculative concern never detained Congress. Nor has it caused a single lower court to construe subsections (b)(1)–(3) to include tax-exempt property in the comparison class. As a practical matter, States are far too reliant on property taxes from non-railroad sources to be able to leave only the railroads subject to ad valorem taxation.[16] Congress was undoubtedly aware of that reality when it determined that the important protection to extend to the railroads was parity with other taxed property; beyond that, it declined to intrude on

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[15] Legislative history has proven largely unhelpful in many of the controversies that have arisen relating to § 306. *See, e.g., Burlington No. Ry. Co. v. Okla. Tax Comm'n*, 481 U.S. at 456 (legislative history "inconclusive and irrelevant"); *Chesapeake Western Railway v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991), *cert. denied* ___ U.S. ___, 112 S.Ct. 1577 (1992)(legislative history "admittedly rather thin"); *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983)(§ 306 was part of a much larger act and received "scant attention" in the legislative history).

[16] For example, in Oregon, property taxes from the railroad industry account for only a relatively small proportion of Oregon's $2 billion plus property tax bill.

the policies reflected in State choices to exempt certain forms of property altogether.[17] The balance Congress struck may not be perfect from either the States' or the railroad industry's perspective. The correct question for lower courts, however, has been whether removing tax-exempt property was the choice Congress made. On that point, the courts have been unanimous. Beyond that, the response to the railroads' argument is the one the Eleventh Circuit gave:

> Trailer Train has argued that it is inconsistent to hold that *partially* exempt property must be considered under § 306(1)(a) but that *totally* exempt property need not be. . . . [It is not] the prerogative of this court to amend the statute in order to correct some perceived inconsistency in application.

Department of Revenue, State of Florida v. Trailer Train, 830 F.2d at 1572 n.11(emphasis in original).

In short, whatever may be said of the breadth of subsection (b)(4)(prohibiting "any other tax" that discriminates) and the limitations of subsections (b)(1)-(3)(prohibiting discriminatory ad

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[17] The choice Congress made in fact appears to be a product of compromise. States lobbied vigorously to be able to have partially exempt property insulated from challenge as well (*see* citations, *supra* at fn.12), a result which would have limited the protection to railroads drastically. Toward the end of the congressional deliberations, the Senate appeared to side with the States on this point and included in its version of the bill a provision that would have precluded a suit against any State with a provision in its constitution providing for a reasonable system of property classification (*e.g.*, a system of partial exemptions). In contrast, the House version at this point not only lacked protection for partially exempt property, but it still permitted a claim of rate discrimination to be based on a comparison to fully exempt property. *See* H.R. 10979 (1975). The apparent compromise struck in the Conference Committee was to require that railroad taxes be equitable in relation to all taxed property, including property that is partially exempt, but to permit States to retain tax exemptions by not using them in the formula for comparison. *See* S. Rep. No. 959, 94th Cong., 2d Sess. 27-28 (1976). The fact that no constituency is appeased is often the surest sign of political compromise.

valorem taxes), one conclusion is beyond quarrel: Congress deliberately crafted the 4R Act so that a State's policy choice to exempt property from taxation altogether could not be used to invalidate either the tax rates or assessments applied to railroad property. Necessarily, Congress assumed that States would *both* tax property owned by railroads and exempt other property from any taxation. The Ninth Circuit's *per se* rule ("any exemption not also available to railroads violates the statute") could not be more at odds with Congress's design. Nor could it more thoroughly unravel the protection Congress deliberately gave to the States' taxation schemes.

II

The Issues Presented Are Important and Merit Review

A. Lower Courts Need this Court's Guidance.

In the 13 years since § 11503 went into effect, this Court only once has agreed to review the section's provisions and to resolve uncertainty about the meaning of its language. *Burlington No. Ry. Co. v. Okla. Tax Comm'n*, *supra*, (whether Act confers jurisdiction to review alleged claim of discriminatory overvaluation). During that same period, lower courts have struggled to divine Congress's intent largely on a case-by-case, dispute-by-dispute basis. As the Fifth Circuit observed:

> For better or worse, the tax provisions of the 4R Act give us few substantive and procedural standards. Therefore, in the manner of the common law, we must work out the meaning of 49 U.S.C: § 11503 gradually in relation to specific disputes.

Kansas City Southern Ry. Co. v. McNamara, 817 F.2d 368, 379 (5th 1987).

The Ninth Circuit's decision in this case demonstrates several areas in which, over time, inconsistency, uncertainty and conflict have arisen among the lower courts. As the case law now stands,

whether railroads may prevail on a claim of "exemption discrimination" and, if so, what remedy they will win depends significantly on the jurisdiction in which the suit is brought.

1. Reconciling subsections (b)(1)-(3) with (b)(4).

At least in fundamental principle, the Ninth Circuit's decision conflicts with the several lower court opinions interpreting the ad valorem tax provisions of § 11503. As observed earlier, the courts unanimously have concluded that in enacting subsections (b)(1)-(3), Congress expressly declined to permit railroads to invalidate state tax rates and assessments by comparison to tax-exempt property. *See* pp. 10-11. Thus, lower courts have concluded that Congress was "well aware" of the limits it was placing on the comparison. *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d at 1571-72 and n.10. In that awareness was Congress's tacit approval and validation of State authority to grant tax exemptions:

> The 4-R Act does not require a state to tax all business personal property; *the state is free to grant any exemptions*. What the Act does require, however, is that whatever property is taxed be taxed at a rate that does not discriminate against railroad property.

Clinchfield Railroad v. Lynch, 784 F.2d at 553 (emphasis added).

Congress could not have intended it both ways: on the one hand to leave States free to grant any exemptions, and on the other to invalidate their taxation of railroad property (as the Ninth Circuit has) the moment they did. The inherent inconsistency of those two results begs for resolution.

2. The scope of subsection (b)(4).

Even construing the scope of subsection (b)(4)'s prohibition of "any other tax" that discriminates has proven somewhat problematic. On the one hand, the Virginia Supreme Court has concluded that subsection (b)(4)'s reference to "any other tax"

does not include ad valorem taxes dealt with in the prior subsections, but rather refers to other or different schemes of taxation not contemplated in those provisions. *Richmond, Fredericksburg & Potomac R.R. Co. v. State Corp. Comm'n.*, 230 Va. 260, 336 S.E.2d 896, 897 (1985). By contrast, some earlier cases construed subsection (b)(4) to be limited to "in lieu" taxes — that is, taxes imposed in place of property taxes. *See generally Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d at 372-74 (discussing cases).[18] *Cf. Chesapeake Western Railway v. Forst*, 938 F.2d 528 (4th Cir. 1991) *cert. denied* ___ U.S. ___, 112 S.Ct. 1577 (1992)(narrowly interpreting subsection (b)(1) using similar rationale).[19]

To be sure, however, the weight of authority construes subsection (b)(4) more broadly. Most circuit courts have concluded that the prohibition against "any other" discriminatory tax expresses Congress's general concern with tax discrimination of any kind. *Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983) *cert. denied* 465 U.S. 1100 (1984). *See also Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d at 371-74 (canvassing cases). But as the Fifth Circuit

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[18] In *McNamara*, Judge Gee acknowledged the "simple and compelling" argument that had been made in those cases. 817 F.2d at 372. However, he found it "too late in the judicial day" to agree with those decisions, for the "shadows have lengthened across their arguments, as one-by-one every Court of Appeals that has considered [whether subsection (b)(4) is limited to "in lieu" taxes] has sided with the railroads." 817 F.2d at 374.

[19] The Fourth Circuit declined to permit the railroads to challenge the appropriateness of the accounting methods by which a State determines the value of railroad property, a question this Court left open in *Burlington No. Ry. v. Okla. Tax Comm'n, supra*. It held that the statute should be read narrowly, especially when to do otherwise would embroil the court in matters that bear on the policy-making powers of state government and that require the court to pass judgment on the "reasonableness" of a State's exercise of taxing authority. 938 F.2d at 531-33.

observed, "the meaning of 'discrimination' presents a somewhat trickier problem." 817 F.2d at 374. On that point, the circuits are far more fragmented.

3. When state taxes are "discriminatory."

In entertaining challenges to a State's system of tax exemptions, no court (other than the Ninth Circuit in this case) has held that the mere existence of a class of tax-exempt property, without more, violates the statute. Instead, the lower court decisions suggest at least three approaches.

First, courts have tested whether a State's exemptions are "neutral" — that is, whether they are directed to classes of property that railroads merely happen not to own — or whether railroads as a class of taxpayer have been singled out for adverse tax treatment. If railroads may bring themselves within the exemption on the same terms that all other taxpayers may, the exemption is not "discriminatory" within the meaning of the statute. The key is whether a State identifies taxed property by what is owned rather than by who owns it.[20]

The Eighth Circuit suggested that approach with its decision in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981) *cert. denied* 454 U.S. 1086 (1981). In that case, certain "centrally assessed" property was taxed, but the identical property if "locally assessed" was tax-exempt. Because the "centrally assessed" property was, by definition, property owned

[20] Two hypotheticals demonstrate how the "neutrality" analysis would invalidate Oregon's tax on railroad property if the facts here were different. If Oregon exempted all property held by a commercial business for lease (which is does not) but taxed carlines' inventory of railroad cars held for lease, the disparate taxation would be discriminatory. Similarly, because Oregon exempts all business inventory, if it taxed the inventory of a company whose business was selling railroad cars to railroads (which it does not), the difference in treatment would again be deemed discriminatory.

by railroads and other utilities, the effect was to tax property owned by railroads *because* it was owned by railroads, and to leave the same type of property tax-free if owned by others. The same situation was presented in *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985). There, Iowa "rolled back" the assessed value of all locally assessed property, leaving it tax-exempt. Centrally assessed property, which again was defined by who owned it (railroads and a few other entities), was fully taxed. Again, the Eighth Circuit found such a scheme to be "discriminatory" because it denied to railroads as a class of taxpayer a benefit which other taxpayers as a class enjoyed. *But cf. Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988) *cert. denied* 490 U.S. 1066 (1989).[21] In contrast, where the exemption is directed to a class of property (*e.g.*, business inventory) that railroads happen not to own, but that would be exempt if they did, claims of discriminatory treatment have been rejected. *Trailer Train Co. v. State Board of Equalization, supra*.[22]

[21] The Eighth Circuit in *Leuenberger* rejected Nebraska's defense of its scheme, in which it asserted that its exemption of 75% of personal property was neutral and non-discriminatory. At first blush, the approach the Eighth Circuit took in that case appears inconsistent with the rationale of its decisions in *Ogilvie* and *Bair*. The explanation may lie in the final portion of the court's decision, where it concludes that the result of Nebraska's high percentage of exemptions "is that the exemptions apply to certain taxpayers" as in *Ogilvie* and *Bair*. 885 F.2d at 418. The court thus suggested that while the exemptions may have been neutral on their face, that neutrality disappeared at the point that nearly all property in the State was exempt from taxation except property the railroad owned.

[22] The district court concluded:

> There is absolutely no indication that the creation of an exemption for business inventory discriminates against transportation property. The ratio of the assessed value of commercial and industrial property to its true market value is exactly the same as that for transportation property. The

(continued...)

Other federal decisions suggest a second approach, one which would require examination of a State's entire taxing scheme to ensure that the tax burden is fairly distributed. The Eleventh Circuit, in a case challenging Alabama's gross receipts tax on railroads (which applied in place of property taxes), reversed the district court's holding that subsection (b)(4) did not permit it to entertain the suit. *Alabama Great Southern Railway Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981). The court of appeals directed the trial court on remand to consider "whether it would be appropriate for it to consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial businesses by the State of Alabama.'" 663 F.2d at 1041. The Eleventh Circuit later adhered to that approach in a case involving the identical challenge carlines press here: that exempting "business inventory" from taxation while taxing property held by railroads is discriminatory. *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d at 1574 (remanding for trial). The court sent the case back for trial with the same instructions as in *Eagerton*.

In contrast, at least two courts have expressly declined to scrutinize a State's entire tax system. They have considered it "unrealistic to suppose that the overall burden of a state's tax system could be rationally evaluated by the methods of litigation." *Burlington Northern R. Co. v. City of Superior, Wis.*, 932

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[22] (...continued)
state's treatment of business inventory does not reflect a differential treatment of taxpayers as to the assessment ratio or the applicable tax rate. At most, this case represents a case where an exemption is made available for a class of property which the plaintiffs do not own.

538 F.Supp. at 512. The district court below found Oregon's system neutral under this analysis. (App-32).

F.2d 1185, 1187 (7th Cir. 1991).[23] *Accord Kansas City Southern Ry. Co. v. McNamara, supra*. In place of that approach, they have adopted yet a third measure for what constitutes "discriminatory" taxation: as long as a State taxes railroads as part of a larger class of taxpayers, the tax will be sustained even if property owned by other groups is tax-free. As Judge Posner stated:

> The state is confined to taxing railroads as members of larger taxpayer groups — owners of commercial and industrial property, recipients of gross income, recipients of net income, whatever. It cannot levy a tax on inputs into railroading alone.

Burlington Northern R. Co. v. City of Superior, Wis., 932 F.2d at 1188. The rationale for this test is that the criteria for selection are not invidious if they do not target railroads as a politically powerless industry:

> The only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden.

Kansas City Southern Ry. Co. v. McNamara, 817 F.2d at 375.[24]

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[23] The Seventh Circuit's decision was not unanimous. Judge Flaum wrote a strong dissent in which he argued the need to make the more searching examination that the majority decision rejected. 932 F.2d at 1188–90.

[24] At least since *United States v. Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938), this Court has recognized that the ability to form a political alliance with others similarly situated is the most powerful form of protection against discrimination. The rationale for a test that "ties the railroads' fate to the fate of a large and local group of taxpayers" fits precisely with Congress's reason for extending special tax protection to the railroads in the first instance. S. Rep. No. 1483, 90th Cong., 2d Sess. 2 (1968) (describing railroads as "easy prey for State and local tax assessors" because they are "nonvoting, often nonresident, targets for local taxation.")

The lower federal appellate courts have thus differed in their views of how to determine when "any other tax" is discriminatory within the meaning of subsection (b)(4). The Ninth Circuit followed none of the approaches used by the other circuits. Rather, it adopted a rule which rendered the invalidity of Oregon's system a foregone conclusion.[25] In any of these other circuits, Oregon's system of exemptions would have been sustained outright or it would at least have been subject to meaningful examination. Under the test in the Fifth and Seventh Circuits, Oregon would have prevailed: railroads receive the same tax treatment as a large and significant majority of Oregon commercial and industrial taxpayers. In the Eleventh Circuit, Oregon's entire tax structure would have been examined to determine whether the tax treatment of railroads is comparable to that accorded other commercial and industrial taxpayers. It is difficult to see how Oregon's system would have failed that test.[26] Even in the Eighth Circuit, on whose cases the Ninth Circuit purported to rely, Oregon's exemptions would have been tested for their neutrality, either facially (whether the exemption is based on what is owned rather than who owns it) or as applied (whether such a large percentage of non-railroad property is

[25] The Sixth Circuit has implicitly rejected a *per se* test, thereby further isolating the Ninth Circuit. The court affirmed the denial of a preliminary injunction to a railroad complaining that Tennessee, like Oregon, exempts business inventory but taxes railroad property. *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, ___ F.2d ___ (May 15, 1992).

[26] For example, although the district court in this case rested its decision in large measure on the neutrality of Oregon's tax structure (App-33), the court also considered property not subject to the ad valorem taxes but taxed in other ways. Specifically, the court rejected carlines' contention that standing timber should be treated as "exempt." The court stressed that timber is subject to a severance tax when cut and declined to find that carlines were discriminated against as a result of this difference in treatment. *Ibid.*

exempt that the court can infer a discriminatory design). Oregon prevailed under that test when the district court applied it: it found Oregon's tax system neutral and non-discriminatory under both prongs. The Ninth Circuit, however, held Oregon to a novel *per se* rule — any exemption of property not owned by the railroads is discriminatory. That was a test neither Oregon nor any other state in the country could survive.

4. The appropriate remedy.

The Ninth Circuit concluded that the State should be enjoined from collecting any property taxes from carlines, thus rendering them fully tax-exempt. At least one other court has done the same, and the Ninth Circuit expressly relies on that court's decision for the remedy it fashions here. (App-19)(citing *Trailer Train Co. v. Leuenberger, supra*). On its facts, however, the *Leuenberger* decision does not fit comfortably with this case. The Eighth Circuit's decision specifically relied on the high percentage (75%) of total commercial and industrial property that was exempt under the State's scheme, stating: "When three-fourths of the commercial and industrial personal property in the state is not taxed . . . railroads are discriminated against if their personal property is taxed. The appropriate remedy . . . is to enjoin the collection of the discriminating tax[.]" 885 F.2d at 418. Whether the Eighth Circuit would have reached that conclusion on the facts present in this case is highly doubtful.[27]

In contrast to that limited support for the Ninth Circuit's remedy, railroads generally are restricted under § 11503 to a remedy that gives them equal treatment, rather than favored

[27] The district court found that between 31% and 38% of total commercial and industrial personal property available for taxation in Oregon is exempt. (App-31-32). The Ninth Circuit resolved all doubts in the State's favor and assumed a figure of 25% for purposes of its analysis. (App-18).

status. Under all of the other provisions of the Act, courts uniformly have concluded that railroads may only be relieved of taxes that exceed the *average* tax imposed in a jurisdiction. *See, e.g., Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 868 (9th Cir. 1983) *cert. denied* 464 U.S. 846 (1983)(under subsection(b)(3)); *State of Arizona v. Atchison, Topeka & S.F. R. Co.*, 656 F.2d 398 (9th Cir. 1981)(under subsection (b)(1)).[28] The Ninth Circuit's remedy, at least in this context, transforms a congressional policy designed to give railroads equal tax treatment into a policy that bestows on them the most favorable tax treatment accorded any category of property under a State's taxing policies.[29] Within the context of the Act as a whole, this remedy creates an anomaly that cannot easily be explained, and the Ninth Circuit's decision makes no effort to try.

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[28] Relying on unequivocal legislative history, the Ninth Circuit concluded:

> The pertinent comparison was meant to be between the property of the railroad and that of the "average" taxpayer "[t]o make the fairest comparison—that of the carrier with the hypothetical 'average' taxpayer—the committee intends that the unit to be used is that of all parcels of property in the district, considered in the aggregate." S. Rep. No. 91-630, 91st Cong., 1st Sess. 10 (1969). Other interpretations were explicitly rejected. The language was not meant to permit railroads to demand the same treatment as those holding property with the lowest assessment ratio[.]

Id. 656 F.2d at 404. *Accord General American Transportation Co. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986); *Louisville and Nashville R. Co. v. Dept. of Rev.*, 736 F.2d 1495 (11th Cir. 1984); *Clinchfield Railroad Co. v. Lynch*, 700 F.2d 126 (4th Cir. 1983)(citing legislative history).

[29] Perplexingly, the Ninth Circuit insisted that carlines be given tax-exempt status so that they would receive the same benefit that "preferred property owners" enjoy. (App-19). Oregon, however, determines tax rates and assessments only on the basis of property type, not on the basis of property owner. There is, accordingly, no class of "preferred property owners" as the Ninth Circuit suggests, other than the preferred class of railroads that the Ninth Circuit creates.

5. Nullification of subsections (b)(1)-(3).

As the Ninth Circuit interprets the Act, little remains of Congress's original design. The substantive rule the court announces, in combination with the remedy the court grants, all but nullifies the provisions relating to ad valorem property taxes. It is not merely rhetorical to ask why a railroad would ever again challenge a State property tax scheme under subsections (b)(1)-(3). Within the jurisdictional boundaries of the Ninth Circuit, there in fact is no reason why a railroad should. A railroad need never be content with merely demanding that a State's tax rates and assessments be equitable in relation to all other taxed property in the same jurisdiction. Instead, by pursuing a challenge under subsection (b)(4) — the generic "any other tax" provision — a railroad may point to the existence of *any* tax-exempt property in the State and thereby avoid all taxation of its own property. Where Congress endeavored to provide railroads with tax equality, the Ninth Circuit has handed them the windfall of tax freedom. Because every state exempts more than a *de minimis* level of property, the Ninth Circuit's decision renders the ad valorem provisions of § 11503 dead letters that no railroad rationally should invoke in the future.

B. The Ninth Circuit's Decision Has Significant Implications for State Taxing Authority.

The tax structures of the several States vary greatly. For the most part, States are free to exercise their sovereign power to raise revenue in ways that best suit the diverse circumstances of their population, wealth, natural resources and local economies. Despite the differences in state taxation systems, two features are common to all: property taxation is a crucial source of revenue for every state government, and every State exempts classes of property from ad valorem taxes to advance key state economic and policy concerns. If, as the Ninth Circuit now holds, no State

may exempt even one class of property without also exempting all property owned by railroads, then Congress's reform was truly radical.[30]

If the Ninth Circuit has accurately construed Congress's intent, then Oregon (and presumably all other states, in time) properly will comply with it. Compliance will be at considerable cost, however. One option is for Oregon to restructure its entire property tax system to eliminate all tax exemptions. In reality, exercise of that option is unlikely, for it would stir insurmountable political and economic controversy and ultimately it would undermine important policies that Oregon cannot afford to sacrifice.[31] Oregon's other alternative is to give tax-exempt status to all property owned by railroads and affiliated industries. In terms of lost tax revenue from the railroad industry alone, this

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[30] In asserting that the Ninth Circuit's decision precludes the exemption of even one class of property, we do not overstate the court's holding. To be sure, the court left open the possibility that a purely *de minimis* level of exempt property might not be deemed "discriminatory." The Ninth Circuit makes it plain, however, that non-taxed property would have to comprise a very small fraction of a State's total taxable property. (App-17). We are aware of no State that could survive the Ninth Circuit's *de minimis* test.

[31] The practical and political difficulty of completely eliminating exemptions from State ad valorem taxing schemes could not have escaped Congress's awareness. Throughout the 15 years the Act was under consideration, the States had lobbied Congress strenuously for the ability to retain their exemptions. *See* fn. 12, *supra*. Congress in fact rejected the Doyle Report's recommendation for a form of tax exemption for railroads (no tax on railroad rights-of-way) in favor of the tax equality suggested, ironically, by the Association of American Railroads. *See*, Doyle Report, *supra* at 463–66.

would total at least $9 million a year.[32] Lost revenue in other States will magnify that impact many times over.[33]

That this case promises to generate litigation for lower courts, rather than settle it, is not a matter of idle speculation. Not surprisingly, the Ninth Circuit's decision has already prompted the filing and the recasting of lawsuits by other railroads and affiliated industries in Oregon seeking relief from taxation for all of their real and personal property.[34] Other railroads and affiliated industries predictably will now seek protection from property taxation in other Ninth Circuit States; some of those lawsuits, too, already have been launched.[35]

The implications of the Ninth Circuit's decision potentially reach beyond the taxation of railroad carriers, however. Both the

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[32] The Oregon Department of Revenue estimates that in 1988, the year at issue in this case, approximately $9 million in taxes was collected from railroads and affiliated industries based on the value of their "transportation property."

[33] Other States are expected to file an amicus brief in support of this petition for writ of certiorari to explain the potential impact of this decision on them.

[34] Carlines sought relief from personal property taxation only. The railroad industry, however, interprets the Ninth Circuit's decision to apply equally to real property. Two lawsuits have already been filed seeking full real and personal property tax exemptions for other railroads. *Burlington Northern Railroad v. Department of Revenue of the State of Oregon*, U.S.D.C. (D. Or., No. 92-585RE); *Portland Terminal Railroad v. Department of Revenue of the State of Oregon*, U.S.D.C. (D. Or., No. 92-607FR).

[35] When the Ninth Circuit announced its decision in this case, the State of Washington was soon to go to trial on a similar challenge to their tax exemptions brought in *Burlington Northern Railroad v. Department of Revenue of the State of Washington*, U.S.D.C. (W.D. Wash., No. C89-518(T)WD). The plaintiffs in that case immediately moved to expand their claim for relief to seek the remedy the Ninth Circuit granted here. The same railroad has now filed a similar claim for a subsequent tax year. *Burlington Northern Railroad v. Department of Revenue of the State of Washington*, U.S.D.C. (W.D. Wash., No. C92-5178(T)WD).

airline and motor carrier industries benefit from legislation modeled on the 4R Act which prohibits discriminatory taxation in similar but not identical terms. 49 U.S.C § 11503a (motor carriers); 49 U.S.C. App. § 1513 (airlines). Case law and legislative history relating to § 11503 often guides courts in their consideration of discrimination challenges brought under those statutes. *See, e.g., ABF Freight System, Inc. v. Tax Division of the Arkansas Public Service Commission*, 787 F.2d 292, 293 n.1 (8th Cir. 1986). No doubt, in light of this decision, lawsuits brought by plaintiffs in those industries seeking tax-exempt status under the parallel federal legislation will follow. In fact, lawsuits advancing a similar theory had been filed in Oregon before the Ninth Circuit's decision even issued, and one has been filed in the State of Washington since.[36]

As significant is the possibility that States will be required, under other federal or state law principles, to relieve added classes of commercial and industrial taxpayers from taxation if the railroads are so relieved. Property taxes on other "centrally assessed" utilities in Nebraska have been invalidated on exactly that ground, in light of the Eighth Circuit's holding under the 4R Act that Nebraska must give the railroads tax-exempt status.[37] *Northern Natural Gas Co. and Enron Liquids Pipeline Co. v. State Board of Equalization and Assessment*, 443 N.W. 2d 249 (Neb. 1989) *cert. denied* 493 U.S. 1078 (1990)(analysis under federal equal protection principles and state constitution's tax

[36] *E.g., American Airlines v. Department of Revenue*, Oregon Tax Court No. 3140; *Continental Airlines v. Department of Revenue*, Oregon Tax Court No. 3135; *Alaska Airlines, Inc. et al. v. King County, et al.*, King County Super. Ct. No. 92-2-14872-2. These cases have been filed in state court because 49 U.S.C. App. § 1513 does not confer jurisdiction on the federal courts.

[37] *Trailer Train Co. v. Leuenberger, supra.*

uniformity clause). Oregon appears to be facing an identical claim, filed on behalf of a public telephone utility.[38]

Of course, lower courts properly can and should adjudicate those collateral issues first; none of them are presented to this Court yet. But, as the district court observed: "This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with [§ 11503]." (App-28). The eruption of litigation that has followed in the brief period since this decision was announced demonstrates the long-range significance of the Ninth Circuit's holding. Its potential to force Oregon and other States to restructure their tax systems is real. In that process, states either will have to forego significant sources of revenue or burden more heavily the already strained resources of other taxpayer groups. This Court should review the Ninth Circuit decision before Oregon and other States are forced to travel the full length of the course the Ninth Circuit has set. By doing so, the Court can provide needed and timely guidance on the application of a statute that should reflect a uniform national policy, but that has sent lower courts in often inconsistent directions and has left States unsure of what federal law requires.

[38] Shortly after the Ninth Circuit announced its decision, the plaintiffs in *US West Communications, Inc. v. Department of Revenue* (Oregon Tax Court No. 3143) provided Oregon with a draft of an amended complaint incorporating a theory that appears to seek a tax exemption on the same theory that prevailed in the Nebraska case.

CONCLUSION

This Court should grant the petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF OREGON,

Defendant-Appellee.

No. 90-35402

D.C. No. CV-88-1169-OMP

OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Chief District Judge, Presiding

Argued and Submitted
January 8, 1991 — Portland, Oregon

Filed April 8, 1992

Before: James R. Browning, William C. Canby and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

[Names of counsel omitted in printing]

TROTT, Circuit Judge:

Appellants (collectively, the "Carlines") challenge the district court's judgment in favor of the Department of Revenue of the State of Oregon (the "DOR"). The Carlines sought declaratory and injunctive relief against the DOR's assessment and collection of the Carlines' personal property tax for 1988, alleging discriminatory taxation in violation of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (the "Act").[1] The

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[1] In 1976, Congress passed section 306 of Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (1976), to solve the problem of discriminatory state taxation of railroads. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 was originally codified at 49 U.S.C. § 26c, and its language was "slightly altered" when recodified in the Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, 92 Stat. 1337 (1978), 49 U.S.C. § 11503 (1988). *Id.* at 457 n.1. The recodified version "may not be construed as making a substantive change in the laws replaced." *Id.* (quoting section 3(a), 92 Stat. 1466); *see also Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 258 (10th Cir. 1981) ("*Lennen I*"); *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen*, 732 F.2d 1495, 1497 (10th Cir. 1984) ("*Lennen II*"). "Because the revision was not intended to change the law, we must resolve any substantive conflicts between the original language of § 306 and the language in § 11503 in favor of the original language." *Lennen II*, 732 F.2d at 1497 (citing *Lennen I*, 640 F.2d at 258). There is, of course, an exception to this general rule for resolving conflicts between the original and the new language: If substantive language has disappeared altogether, there is nothing left to interpret. For example, section 306(1)(a) contained language that prohibited discriminatory assessments "(but only to the extent of any portion based on excessive values as hereinafter described) . . ." The language in parenthesis was deleted in the recodification. In *Arizona v. Atchison, Topeka & Santa Fe R. Co.*, 656 F.2d 398 (9th Cir. 1981), Arizona tried to take advantage of this language in a lawsuit filed after the language was deleted in the recodification, but this court denied the attempt, holding that "it is not necessary to interpret language in a statute that never went into effect, when there is no language in the statute that may lend itself to the interpretation put forward by Arizona." 656 F.2d at 410.

This case involves section 11503(b)(4), which provides in relevant part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . . .

(continued...)

district court ruled the Carlines had not sustained their burden of showing impermissible discrimination, and denied relief. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I

Federal Statutory Framework

Section 306(1) prohibits states from taxing transportation property in a discriminatory fashion. It provides in relevant part:

> (1) . . . [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value

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[1](...continued)

> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under . . . this title.

The corresponding provision of section 306 provides that a State may not impose "any other tax which results in discriminatory treatment of a common carrier by railroad." Pub. L. No. 94-210, § 306(1)(d). To avoid any potential distortion of the meaning of the original enactment, we will therefore rely on the language of section 306(1)(d) in deciding this case.

of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad subject to this party.

Pub. L. No. 94-210, § 306(1) (emphasis added).

The parties have stipulated that the Carlines' property is "transportation property" within the meaning of the Act. "Commercial and industrial property" is defined as:

> all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy . . . .

Pub. L. No. 94-210, § 306(3)(c).

Section 306(2) provides that "the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section . . . ." Pub. L. No. 94-210, § 306(2).

II

Oregon's Ad Valorem Tax Scheme

All real and personal property in Oregon except that expressly exempted is subject to ad valorem taxation, and must be assessed and taxed "in equal and ratable proportion." Or. Rev. Stat. §§ [*sic*] 307.030 (1989). All personal property must be valued at 100 percent of its fair market value. Or. Rev. Stat. § 308.250 (1989). Certain classes of business personalty are exempt from ad valorem taxation, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals, and agricultural products in the possession of farmers. Or. Rev. Stat. §§ 307.400, 307.325 (1989). Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. Or. Rev. Stat. § 803.585 (1989). Standing timber, which many regard as a cornerstone of the State's economy, is also expressly exempt from ad valorem taxation. Or. Rev. Stat. §§ 321.272, 321.420 (1989). Standing timber is considered real property, and is taxed under a separate scheme when it is harvested. Or. Rev. Stat. §§ 307.010(1), 321.005, *et seq.* (1989).

The State of Oregon taxes railroad cars as "tangible personal property." Or. Rev. Stat. § 307.030 (1989). The Carlines claim Oregon's taxation of railroad property is discriminatory, in violation of section 306(1)(d), because "a large majority of non-railroad business personal property is not taxed" while railroad property is taxed in full. The district court held that, although the Carlines had standing to bring an action under section 306 (1)(d), Oregon's exemption scheme constituted neither *de jure* nor *de facto* discrimination against the Carlines.

On appeal, the Carlines challenge the district court's ultimate conclusion, as well as the methodology it employed in examining

the discrimination issue. Although the DOR agrees with the district court's ultimate conclusion that there was no discrimination in violation of section 306(1)(d), it argues that the type of discrimination the Carlines allege should not have been analyzed under section 306(1)(d), but rather under 306(1)(a) or (c). We agree with the Carlines that the discrimination claim was properly analyzed under section 306(1)(d) and that the Carlines made the necessary showing of discrimination.

III

Standard of Review

This matter was submitted to the district court on the pleadings, a stipulation of facts, and briefs. On appeal, we must determine whether the district court correctly applied the law to the stipulated facts. "Because the parties submitted this case on stipulated facts, the court's review is limited to a de novo examination of questions of law." *Elwood v. Aid Ins. Co.*, 880 F.2d 204, 206 (9th Cir. 1989). Further, "[s]ince the district court's application of the statutory scheme to the stipulated facts required consideration of the values underlying that scheme, the proper standard of review on appeal is de novo." *Sunshine Mining Co. v. United States*, 827 F.2d 1404, 1406 (9th Cir. 1987); *see also Schwartz Rojas v. Commissioner*, 901 F.2d 810, 812 (9th Cir. 1990) ("We review de novo the applicability of [the Internal Revenue Code] to the stipulated facts.").

"Though we would normally review the district court's findings of fact for clear error, the parties' stipulation to the facts obviates such review." *Planned Parenthood of S. Nevada v. Clark County School Dist.*, 887 F.2d 935, 939 (9th Cir. 1989) citation omitted).

IV

The Discrimination Claim

The Carlines argue that Oregon's exemption scheme violates section 306(1)(d). They claim "it is a violation of section 306(1)(d) to fully tax rail transportation personal property when substantial amounts of personal property of other commercial and industrial property of other commercial and industrial property owners [are] not taxed." The DOR's response is two-pronged. First, the DOR claims the Carlines may challenge Oregon's property tax scheme only under section 306(1)(a) or (c), which prohibit ad valorem taxation of railroad property at a higher "assessment ratio" or "rate" than non-railroad property,[2] but

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[2] The DOR argued below that the Carlines do not have standing to sue under section 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions. Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under section 306, we have considered such challenges without discussing the standing question. *See, e.g., ACF Industries v. State of Arizona*, 714 F.2d 93 (9th Cir. 1983); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 864 (9th Cir.), *cert. denied* 464 U.S. 846 (1983). In this case, we agree with the district court that the Carlines have standing.

Section 306(1)(d) prohibits any tax that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also "results" in discrimination against the railroads. Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized "the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." *Department of Revenue, State of Florida v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987); *see also Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir. 1991) (section 306 covers entities who are "engaged in the business of leasing railroad cars to railroads that use the leased cars in their interstate operations"); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985) (same); *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 471–73 (8th Cir. 1983) ("[B]ecause tax discrimination

(continued...)

which do not prohibit discriminatory exemption schemes. *See ACF Indus. v. Arizona*, 714 F.2d 93 (9th Cir. 1983).

The DOR contends that the broader anti-discrimination provisions of subsection (1)(d) cannot be invoked in this case. It argues that subsections (1)(a) and (1)(c) fix the permissible scope of *property* taxation. Subsection (1)(d), on the other hand, prohibits "any other tax which results in discriminatory treatment" of the railroads, which to the DOR means that subsection (1)(d) applies only to taxes "*other" than property taxes.* According to the DOR, then, any challenge involving property taxes must be brought under subsection (1)(a) or (c). Because those subsections do not prohibit discriminatory exemption schemes, the DOR essentially argues that discriminatory exemptions in a state's property tax structure cannot be challenged under *any* subsection of section 306.

Second, the DOR contends that, even if the exemption scheme can be challenged under section 306(1)(d), section 306(1)(d) should be interpreted "in light of" sections 306(1)(a) and (c). Subsections (1)(a) and (c) compare transportation property to other "commercial and industrial property" to determine whether discrimination exists. "Commercial and industrial property" is defined as "all property, real or personal . . . which is subject to a tax levy." Pub. L. No. 94-210, § 306(3)(c). Exempt property, by definition, is not taxed, and would therefore not enter into the discrimination calculation

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[2](...continued)

against the Carlines' railroad cars adversely affects common carriers by railroads directly and immediately as tax discrimination against the railroad cars of the carriers themselves, and because section 306(1)(d) prohibits any state tax which '*results* in discriminatory treatment of a common carrier by railroad,' the plain language of the statute supports the district court's holding that [the Carlines have standing.]").

under subsections (1)(a) and (c). The DOR would like us to conclude by analogy that Oregon's exempt property should likewise not be included in the discrimination calculation under subsection (1)(d).

We disagree with both prongs of the DOR's argument, and agree with the Carlines.

A

Applicability of Section 306(1)(d)

We first address the DOR's contention that section 306(1)(d) does not apply to Oregon's exemption scheme because the validity of property tax exemptions is governed exclusively by section 306(1)(a) or (c), and is permitted under both subsections. Arguing that section 306(1)(d) does apply, the Carlines rely on three recent cases in which property tax exemptions were challenged under that section. *See Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom., Boehm v. Trailer Train Co.*, ___ U.S. ___, 109 S.Ct. 2065 (1989); *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Although none of those cases dealt with the precise argument raised by the DOR, we are persuaded by them that subsection (1)(d) must be applied to cases of discriminatory property tax exemptions if Congress's purpose in enacting section 306 is to be served.

Ogilvie involved a challenge to North Dakota's assessment of railroad personal property at a higher ratio than non-railroad personal property. Under North Dakota's taxation scheme, "locally assessed" commercial and industrial property was assessed at 12.2% of market value, while "state assessed" property, including that of the railroads, was assessed at 16.8% of market value. *Ogilvie*, 657 F.2d at 208. As part of this

scheme, North Dakota included personal property and trade fixtures in the assessed value of railroad property, but exempted from taxation the personal property of locally assessed businesses. *Id.* at 209.

The Eighth Circuit held this exemption system violated section 306(1)(d), noting:

> . . . The most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed businesses that is not imposed on locally assessed businesses.

Id. at 210 (quoting *Ogilvie v. State Bd. of Equalization*, 492 F. Supp. 446, 454–55 (D. N.D. 1980)). Because the statute on its face deliberately and openly discriminated against rail transportation property, it violated section 306(1)(d). *Id.*; *see also Leuenberger*, 885 F.2d at 417.

In *Bair*, Iowa "rolled back" the assessed value of all personal property, except that of railroads and a small number of other large taxpayers, with the result that ninety-five percent of personal property owners were exempt from taxation. *Bair*, 766 F.2d at 1224. Burlington Northern claimed the system was discriminatory, and resulted in 50% of Burlington Northern's property that *should* have been classified as personal being improperly classified as real property. Burlington Northern argued that it was entitled to the tax benefits of rollbacks and credits for this 50%. *Id.* The court agreed, holding:

> . . . Iowa's classification scheme results in obvious discrimination against Burlington Northern by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy. This type of *de jure* discrimination clearly falls within the prohibition of section 306(1)(d).

Id.

Finally, in *Leuenberger*, Nebraska exempted certain personal property from taxation. The net result was that "75.75% of commercial and industrial personal property [was] exempt from taxation in Nebraska." *Leuenberger*, 885 F.2d at 416. Like the Oregon statute in question here, the Nebraska statute was "neutral on its face and non-discriminatory, in that it [did] not deny to any individual or entity the ability to benefit from the exemptions provided for specific items of personal property." *Id.* at 417. Even so, the court found the exemption scheme violated section 306(1)(d):

> . . . Section 306(1)(d) prohibits the imposition of any other tax that *results in discrimination* . . . . Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d). It makes no difference whether the discriminatory result is achieved by exempting locally assessed property or exempting the property of particular business, the railroads are being discriminated against contrary to section 306(1)(d). The North Dakota and Iowa statutes gave tax benefits to certain taxpayers, those assessed locally. The Nebraska statute, instead, exempts certain kinds of personal property from taxation whether assessed locally or centrally. However, except for motor vehicles paying registration fees and business inventories, the exemptions apply only to agriculturally related personal property. Nebraska, through the use of exemptions has, in effect, given benefits to those taxpayers involved in agriculture which are denied to taxpayers involved in other businesses or industries. The exemptions are specific. Only taxpayers involved in agriculture are likely to own any of the exempted personal property. It is equally unlikely that

> those involved in agriculture would own any operating railcars. Thus, the result is that the exemptions apply to certain taxpayers, the same as the North Dakota and Iowa statutes.
>
> . . . .
>
> When the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against [the railroads] and violates § 306(1)(d)
>
> . . . .

Id. at 417–418 (emphasis in original); *see also Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 473 (8th Cir. 1983).

These cases demonstrate that sections 306(1)(a) and (c) do not define the limits of the Act's prohibitions against discriminatory taxation of railroads, even when that discrimination occurs in the context of an ad valorem property tax scheme. Subsections (1)(a) and (c) prohibit discrimination in assessment ratios and rates of taxation, but they do not provide that those prohibitions are the only ones applicable to property taxation, nor do they affect subsection (1)(d)'s ban on other types of discrimination. It is not surprising, then, that courts have applied subsection (d) to prevent other forms of discrimination in property taxes that are not reached by subsections (a) and (c).

As the Eighth Circuit stated in *Ogilvie*, the purpose of section 306 "was to prevent tax discrimination against railroads in *any form whatsoever*." *Ogilvie*, 657 F.2d at 210 (emphasis added); *accord Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("'The legislative history and broad language of [§ 306] show Congress possessed a general concern with discrimination *in all its guises* . . . .'") (quoting *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. (1983)) (emphasis added in *Trailer Train*).

To effectuate that intent and prohibit the states from doing indirectly what sections 306(1)(a) and (c) prohibit them from doing directly, section 306(1)(d) must be read broadly. *See Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 (9th Cir.), *cert. denied* 464 U.S. 846 (1983) (different section of the Act interpreted broadly to accomplish congressional purpose of eliminating discriminatory taxation of property). We conclude, therefore, that section 306(1)(d) prohibits not only discriminatory taxes other than property taxes subject to subsections (a) and (c) but also — as here — taxation of a railroad's transportation property which discriminates in a manner other than by assessment ratio or rate.

B

Interpretation of Section 306(1)(d)

Having concluded that section 306(1)(d) applies to Oregon's exemption scheme, we now address the DOR's contention that totally exempt property should not be considered in the comparison because such property is not "subject to a property tax levy."[3]

The DOR relies on cases holding that sections 306(1)(a) and (c) are not violated when states exempt certain classes of property while taxing railroad property in full. *See ACF Industries v. State of Arizona*, 714 F.2d 93, 94 (9th Cir. 1983) ("*ACF Arizona*"); *Clinchfield R.R. Co. v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986) ("*Clinchfield*"); *Department of Revenue, State of Florida v. Trailer Train*, 830 F.2d 1567 (11th Cir. 1987) ("*Trailer Train Florida*"). The DOR would have us apply the holdings of these

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[3] The phrase comes from the definition of "commercial and industrial property" in section 306(c)(3), 49 U.S.C. § 11503(a)(4).

cases to claims brought under section 306(1)(d). We decline the invitation.

In *ACF Arizona*, the Carlines argued that Arizona's property tax was discriminatory under section 306(1)(a). The parties agreed that section 306(1)(a) controlled the dispute, but they disagreed on the meaning of its language.

Section 306(1)(a) forbids states from assessing railroad property at an assessment ratio exceeding the average assessment ratio applicable to all "other commercial and industrial property in the assessment jurisdiction." Pub. L. No. 94-210, § 306(1)(a). The Carlines claimed "that the state ought to include in its calculation of commercial property all the business inventories in the state (which are categorically exempt from *ad valorem* taxes) in determining the assessment ratio." *ACF Arizona*, 714 F.2d at 94. Rejecting this notion for purposes of section 306(1)(a), we noted that "[t]his claim has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored. We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." *Id.*

In *Clinchfield II*, a group of railroads sought recovery for discriminatory taxation in violation of section 306(1)(a). On appeal, the state argued that "the court should not consider stored tobacco inventories because the tax rate applied to them is not the tax rate generally applicable to nonrailroad business property." *Clinchfield II*, 784 F.2d at 552. In essence, the state argued that, because tobacco inventories were taxed at a lower rate than other business property, they should be considered in the same way the *ACF Arizona* court considered the exempt business inventories — "not subject to a property tax levy." The Fourth Circuit rejected this argument, applying the *ACF Arizona* holding narrowly. It nevertheless endorsed the Ninth Circuit's reasoning:

> The court in *ACF [Arizona]* was concerned only with totally exempt property, while the tobacco inventories in this case are taxed, but at a reduced rate. The . . . Act does not require a state to tax all business personal property; the state is free to grant any exemption. What the Act does require, however, is that whatever property is taxed should be taxed at a rate that does not discriminate against railroad property.

Id. at 553.

In *Trailer Train Florida*, the Eleventh Circuit, applying section 306(1)(a), concluded that exempt inventories should not be included in the definition of "other commercial and industrial property.["] The court noted:

> A plain reading of the statute makes it apparent that business inventory which is totally exempt from taxation is not "subject to a property tax levy."

Trailer Train Florida, 830 F.2d at 1571. The court reinforced its conclusion with reference to the Act's legislative history:

> The legislative history of the Act indicates that Congress was well aware of the property which was to be compared under the provisions of § 306(1)(a). In 1961, there was discussion that the comparison would be based on "all other property in the tax jurisdiction." S. Rep. No. 445, 87th Cong. 1st Sess. 465 (1961). Later the comparison was changed to "commercial and industrial property,["] with the latter category of property being confined to property "subject to a property tax levy."

Id. at 1572 n.10; *see also Trailer Train Co. v. State Bd. of Equalization*, 538 F. Supp. 509, 512 (N.D. Cal. 1982) ("*Trailer Train California*").

Although we have no quarrel with the reasoning of the above cases, they are simply inapposite. They apply only to sections 306(1)(a) and (c), which restrict the comparison class to "other

commercial and industrial property." There is no analogous restriction in the broad language of section 306(1)(d). Indeed, the court in *Trailer Train Florida* reached a different conclusion under section 306(1)(d) than under section 306(1)(a): "We agree with the district court's conclusion that § 306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." *Trailer Train Florida*, 830 F.2 at 1573. We conclude that the DOR's reliance on the above cases is misplaced. Our conclusion in Part IV(A) that section 306(1)(d) applies to exemption schemes would have no meaning if exempt property could not enter the equation.

V

The District Court's Methodology

On appeal the parties agree that if "a majority" of nonrailroad property in Oregon is exempt from the ad valorem property tax imposed upon railroad property, discrimination is demonstrated under § 306(1)(d). *See* Appellant's Brief at 9; Appellee's Brief at 32–33. Although the district court declined to adopt any specific threshold, its opinion cited *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), as establishing a fifty percent rule. The district court concluded the Oregon tax did not constitute discrimination under 306(1)(d) because only 30% of non-railroad commercial and industrial property in the state was exempt.

We find no support for a fifty percent threshold in the language of the statute itself which flatly prohibits "any other tax which results in discriminatory treatment" of the railroads. The most natural reading of this language is that the statute is violated by *any* exemption given to other taxpayers but not to railroads. This is the reading adopted by the Eighth Circuit in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981). In that case, North Dakota included personal property and trade fixtures

in the assessed value of railroad property while exempting the personal property of locally assessed businesses. The court found the imposition of a tax on railroad property that was not imposed on non-railroad property violated section 306(1)(d) without reference to the extent to which non-railroad property was exempt. *See id.* at 210.

Nor do the cases support a fifty percent threshold. *Burlington N. R.R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), simply recites as a fact that fifty percent of Burlington Northern's property was in fact personal property and thus eligible for the favorable tax status accorded personal property owned by others. *Id.* at 1224–1225. Similarly, the court in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988), simply found the tax impermissibly discriminatory when 75% of commercial and industrial property but no railroad property was exempt; the court did not suggest a lower level of exemption of non-railroad property would have made the tax nondiscriminatory.

We agree with the Eighth Circuit that any exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under section 306(1)(d). Such a qualification may be implied by analogy to section 306(2)(c) which prohibits the district court from granting relief under section (1)(a) unless the ratio of assessed value to true market value exceeds by 5% the ratio for all other commercial and industrial property — a provision the Supreme Court has read as embodying Congress's desire to avoid the litigation of *de minimis* disparate impact claims. *See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464 (1987).

We do not decide in this case, however, whether such a *de minimis* limitation to the statute's apparently absolute prohibition of tax discrimination against railroads is to be implied. Under the

calculation most generous to DOR, the exemption given to non-railroad property not available to railroads is far from *de minimis*.

The parties disagree as to whether real as well as personal property should be included in calculating the extent of the exemption of non-railroad property; whether standing timber should be part of the comparison class, or should be completely ignored because it is subject to a severance tax at harvest and is simply not subject to ad valorem taxation; and whether non-railroad property that is persistently undervalued and under-reported should be treated as exempt.

Assuming all of these disputes are resolved in DOR's favor, 100% of Carlines' property is subject to Oregon's ad valorem tax, while 25% of non-railroad real and personal property is exempt from that tax.[4] The Carlines pay a substantial amount

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[4]

TABLE

Personal and Real Property (in billions of dollars)
*Assuming Standing Timber is "Exempt"**

Total Real and Personal Property		$39.2
Taxed Property		
Personal Property		
Locally Appraised	$ 3.6	
Non-Railroad Utility	$ 1.2	
Real Property		
Non-Railroad Utility	$ 4.8	
Locally Assessed	$ 8.3	
	$17.9	
Exempt Property		
Business Inventories	$ 6.8	
Farm Machinery & Equipment	$ 1.4	
Motor Vehicles	$ 1.5	
	$ 9.7	
Percentage of Non-Railroad Property that is Exempt from Taxation		24.7%

*Because we assume, as the DOR argues, that undervaluation and underreporting are not discriminatory under section 306, those figures are excluded from the calculation.

annually in ad valorem tax they would not pay if their property was also exempt. We have no doubt this level of discrimination far exceeds any possible *de minimis* exception and thus violates the statute.

VI

Remedy

DOR argues the Carlines are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt. In support of its argument, DOR relies solely on our decisions in *ACF Indus. v. State of Arizona*, 714 F.2d 93, 94–95 (9th Cir. 1983) and *State of Arizona v. Atchison, Topeka, and Santa Fe R.R.*, 656 F.2d 398, 404 (9th Cir. 1981). The decisions in these cases provide no support for DOR's argument. In both cases we were concerned only with what constituted the proper comparison to make out a substantive discrimination claim under section 306(1)(a). In *ACF Indus.*, the Carlines' challenge failed so the court never faced the issue of an appropriate remedy. Similarly, in *Atchison, Topeka and Santa Fe R.R.*, since Arizona sought only a declaratory judgment, the question of other remedies did not arise.

Carlines argues DOR should be enjoined from taxing any of its property under the present statute, relying on *Leuenberger*, 885 F.2d at 418, in which the court held that railroads subject to a discriminatory tax were entitled to the same total exemption preferred property owners enjoyed. We agree. The fact that there may be taxpayers other than railroads who are not exempt and must still pay the tax is irrelevant. These taxpayers are not protected by section 306(1)(d). We remand to the district court to enjoin DOR's collection of the ad valorem tax on the Carlines' property.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY, Plaintiffs, v. DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon, Defendants.	CV No. 88-1169-PA OPINION

[Names of counsel omitted in printing]

PANNER, J.

Plaintiffs (Carlines)[1] bring this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "Department"). They seek declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax year 1988.

The parties agreed that there are no material facts at issue and this case would be tried to the court based on fact stipulations, briefing on the legal issues, and argument. After argument, Department moved to supplement the record. I grant Department's motion to supplement the record (#46).

I find for Department. Below are my findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

BACKGROUND

I. Carlines

Carlines are a group of eight railcar companies. They purchase or lease railcars and furnish them to common carrier railroads for transporting freight. Carlines also furnish railcars directly to shippers. Carlines pay state taxes and pass the costs on to railroads through user charges.

Carlines have strong economic ties to railroad companies. For example, all the shareholders of plaintiff Trailer Train Inc. are railroads. Carlines have various mixes of customer types. For example, GATX Inc. leases 99% of its fleet to shippers and 1% to railroads. The percentages are the reverse for Union Tank Car Company Inc. Some plaintiffs are wholly-owned subsidiaries of others.

[1] The plaintiffs are: ACF Industries Inc., General American Transportation Corp., General Electric Railcar Services Corp., Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company and Union Tank Car Company.

II. The Oregon Property Taxation System

Under ORS 307.030, all tangible personal property in the State is subject to property tax unless it is expressly exempt. Taxes are assessed on 100% of true cash value. ORS 308.250. The average tax rate for 1988 is 2.489% of true cash value.

The following are examples of property expressly exempt from property taxation: agricultural machinery and equipment, business inventories, and agricultural products in the possession of farmers. ORS 307.040 *et seq.*. Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. ORS 803.585. Standing timber is real property under Oregon law. ORS 307.010(1). It is taxed at harvest. ORS 321.005 *et seq.*

As of January 1, 1988, the market values of taxed and untaxed personal commercial and industrial property, motor vehicles, and standing timber in Oregon were as follows:

	Value $ (billions)	% of Total
1. Taxed tangible personal commercial and industrial property, excluding motor vehicles and standing timber	4.8	18.4
2. Motor Vehicles	1.5	5.8
3. Standing Timber	11.6	44.0
4. Exempt	8.2	31.4
5. Total	26.1	100.0

III. The Railroad Revitalization and Regulatory Reform Act

The parties stipulated that § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, as codified, controls this action. Section 306 is codified at 49 U.S.C. § 11503.

Section 306(1) provides:

(1) Notwithstanding the provisions of 202(b), any action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other *commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property*.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on *transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction*.
>
> (d) The imposition of *any other tax which results in discriminatory treatment of a common carrier by railroad* subject to this part.

(Emphasis supplied.) Under § 306(2), the district court has jurisdiction to enjoin substantive violations of § 306.

Paragraph (3)(c) of § 306 defines "commercial and industrial property" or "all other commercial and industrial property" as:

> all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is

> devoted to a commercial or industrial use *and which is subject to a property tax levy* . . . .

(Emphasis supplied.) The parties agree that Carlines' property involved in this action is "transportation property" under § 306. The legislative history of the 4R Act, and its predecessors, spans about fifteen years. The goal of the 4R Act was to "eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property." S. Rep. No. 1483, 9th [*sic*] Cong., 2d Sess. 1 (1968), accompanying S. 927 and S.Rep.No. 91-630, 91st Cong., 1st Sess. 1 (1969).

The parties dispute whether legislative history should be used to interpret § 306, and if so, what that history shows about legislative intent. As often is the case, the legislative history shows a long, bitter battle among various interested groups. The only thing it clearly shows is the intent to compromise.

DISCUSSION

I. Standing

Carlines assert standing under § 306(1)(d). They rely on the § (1)(d) language prohibiting any other tax which "*results in discriminatory treatment of a common carrier by railroad.*" ([E]mphasis supplied.) Carlines contend that this provision grants standing to parties challenging taxes that have a discriminatory effect on railroads, even if the effect is indirect.[2] Department disputes Carlines' standing. It argues that this action concerns a challenge to *property* taxes, the subject of § 306(1)(c), not

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[2] Naturally, such challenges must meet the traditional "case or controversy" requirements of Article III of the United States Constitution, and show injury and causation. *Duke Power Co. v. Carlino Environmental Study Group*, 438 U.S. 59, 72 (1978). However, there is no dispute about those requirements here.

§ 306(1)(d), which concerns *any other tax*. Therefore, Department reasons, the broad language of § (1)(d) does not apply in a challenge to property taxes.

The case law supports both positions. Although no case is binding or on all fours with this case, some of the reasoning is helpful.[3] For example, in *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982) (*Trailer Train California*), the district court considered whether a business inventory property tax exemption that does not apply to railcar companies violates § 306(1)(a). That case presented the question whether § 306(1)(d) applies to railcar companies.

The *Trailer Train California* court held that railcar companies do not have standing under § (1)(d) because it read § (1)(d) as a prohibition against "discriminatory *treatment*" only of railroads. 538 F.Supp at 513. The court construed this as an "unequivocal limitation" of standing to common carriers by railroads. *Id.*

Other courts have held that § (1)(d) challenges are not limited to direct taxes on railroads. *See, e.g., Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Trailer Train v. Bair*, 765 F.2d 744 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985)(citing *Trailer Train v. State Board of Equalization*, 710 F.2d 468, 471-73 (8th Cir. 1983)); *c.f. General American Transportation Corp. v. Louisiana Tax Commissioner*, 680 F.2d 400 (5th Cir. 1982). These courts analyzed the question as one of legislative intent. They relied on the broad purpose of the 4R Act to eliminate the burden on interstate commerce resulting from discriminatory taxation of railroad transportation property.

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[3] I am persuaded by Department's eleven-line footnote with citations to authority, that "[o]ut-of-circuit holdings are not binding upon courts within this circuit." Defendants' Response Brief at 10 n.2.

The Ninth Circuit has not directly addressed standing under § (1)(d). However, in *Trailer Train v. State Board of Equalization*, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983), the circuit took a broad, legislative intent-based approach to a discriminatory railroad taxation question under §§ (1)(a)-(c). There, the court said that a statute should not be interpreted so narrowly as to defeat its obvious intent. 697 F.2d at 865. I agree.

I find reasoning of the Fifth, Eighth and Eleventh Circuits more persuasive than *Trailer Train California*. The law in those circuits is analytically consistent with the Ninth Circuit. The 4R Act prohibits not only discriminatory treatment of railroads, it also prohibits taxation that *results in* discriminatory treatment of railroads.

The *Trailer Train California* court notes that Congress could have removed the restrictive language "common carrier by railroad" if it intended to extend standing to railcar companies. 538 F.Supp at 513. Congress could just as easily have removed the words "results in" if it wanted to limit standing to railroads.

The obvious intent of § 306, taken as a whole, is to prohibit states and local governments from imposing discriminatory taxes on railroads. As the court discussed extensively in *Trailer Train Company v. State Board of Equalization of North Dakota*, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies.

As Department argues, taking this approach to the extreme could produce absurd results. If any company that furnishes products to the railroad industry asserted standing under §(1)(d), there would be almost no limit to standing. Congress certainly could not have intended that. However, given the undisputed

close connections between Carlines and the railroad industry, I need not consider that problem. Carlines have standing.

II. Challenge to the Oregon Property Tax System

The parties offer a vast array of options for deciding this case. They urge me to consider a variety of interpretations of § 306. This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with § 306.

There are two possible types of discrimination under § 306, *de jure* and *de facto*, for lack of better terms. I address each in turn.

A. There is no *de jure* discrimination.

In examining whether there is *de jure* discrimination, I rely on two elements of § 306. First, § 306(1)(a) prohibits assessment of transportation property at a value which is higher in relation to its true market value, than that ratio for all other commercial and industrial property. That language means that a state cannot, for example, assess Carlines' property at 100% of its true market value, while assessing all other commercial and industrial property at less than 100% of its true market value.

Second, § 306(1)(c) prohibits taxing transportation property at a tax rate higher than the rate applied to all other commercial and industrial property. This means that a state cannot, for example, tax Carlines' property at 10% of its assessed value while taxing all other commercial and industrial property at less than 10% of its assessed value.

Oregon does not commit either of these discriminatory acts. All personal property is assessed at 100% of its true market value and is taxed at the same rate. There is no *de jure* discrimination.

B. There is no *de facto* discrimination.

The question of *de facto* discrimination is more difficult. Courts have danced around the possibility of *de facto* discrimination under § 306. Presumably, they recognize how easily a state could evade the clear intent of § 306 by having a facially non-discriminatory tax, but exempting all taxpayers except railroads.

The court raised the specter of *de facto* discrimination in dicta in *Clinchfield R. Co. v. Lynch*, 784 F.2d 545, 552 (4th Cir. 1986). There, North Carolina taxed stored tobacco at 60% of its fair market value, lower than the rate for other property. The court held that the trial court was correct in considering the differential tax rate as a factor in determining whether there was impermissible discrimination, saying:

> Certainly, the 4R Act does not encroach upon the State's right to tax its citizens as it sees fit, as long as that tax does not discriminate against railroads. The problem . . . [with the North Carolina scheme] is not that it grants tax breaks for certain agricultural products. But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would be swallowed up in the exceptions.

784 F.2d at 552.

In *ACF Industries Inc. v. State of Ariz.*, 714 F.2d 93, 94 (9th Cir. 1983), the Ninth Circuit considered the possibility of *de facto* discrimination even more obliquely. The court rejected the argument that under § 306, the State of Arizona ought to include business inventories as commercial property. Arizona categorically exempted business inventories from ad valorem taxes. The court's rejection of this argument was cryptic. It said only that it has "nothing to commend it but a careful lawyer's desire to leave

no possible theory unexplored." The court found no authority requiring untaxed property to be included in an average of assessed value for taxed property.

Trailer Train California is perhaps the most direct stab at the issue of *de facto* discrimination under § 306, but is still not especially helpful. There, the court rejected the argument that exempting business inventories from taxation discriminates against railroads, for two reasons. First, the court read § 306 to require that the comparison class of property be property that is subject to a property tax levy, which by definition the exempt property is not. 538 F. Supp. at 512. This is tautological reasoning that could result in precisely the problem raised in *Clinchfield*.

More significantly, the court found no evidence that the business inventory exemptions were discriminatory against transportation property. The court found no evidence of differential treatment of taxpayers with respect to the assessment ratio or the tax rate. Rather, it was a case of an exemption for a class of property which the plaintiffs do not own. The court characterized the plaintiffs' argument as equivalent to a person with no taxable income arguing that deductions for charitable contributions favor the wealthy. 538 F.Supp at 512. n.5.

In so holding, the court considered the policy reasons behind the business inventory exemption. The exemption was designed to eliminate the incentive for businesses to hold their inventories outside of the state. The court declined to find "backdoor" discrimination, noting that the exemption was neutral in application, and not directed against any particular class of taxpayer. *Id.* at 512. The court was careful to distinguish *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), where personal property exemptions for certain types of property were

available for particular types of taxpayers, but not railroads. *Id.* at 512 n.5.

This case amounts to a request that I examine the personal property tax exemptions in the Oregon tax system to determine whether the exemption scheme is discriminatory.

Carlines' claim rests in large part on the argument that Department violates § 306(d) by exempting standing timber from property taxes.[4] This is conceptually the same type of argument that *Clinchfield* rejected, although in *Clinchfield*, the issue was tax rates, not exemptions. The value of standing timber demonstrates why it is so important to Carlines' argument to label standing timber "exempt".[5] If standing timber and motor vehicles are "exempt", the percentage of exempt property would be 81.6%. Excluding motor vehicles reduces that to 75.8%.

If standing timber and motor vehicles are "subject to property tax", the percentage of exempt property is 31.4%. Excluding motor vehicles increases that to 38.2%. Neither party has provided, and I have found no bright line between a discriminatory and non-discriminatory percentage of exemption. Based on cases that have addressed the issue of what percentage exemption is discriminatory, I would have to conclude that the with- and

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[4] Carlines contend that some of the discriminatory effect of the property tax system comes through underreporting of taxable property. Department agrees that there is underreporting, but contends that the taxpayers are responsible for it and the State of Oregon does what it can to enforce reporting requirements. I agree that underreporting is not prohibited under § 306.

Carlines also contend that undervaluation of taxable property has a discriminatory effect. Undervaluation can be an element of underassessment under § (1)(a). *Burlington No. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). Department concedes undervaluation. However, Carlines have made no showing that undervaluation discriminates against them or that their property is not undervalued along with everyone else's.

[5] To a lesser degree, Carlines rely on the motor vehicle exemption.

without-standing timber figures straddle that line. For two reasons, I do not consider standing timber as exempt.

First, standing timber is taxed under an elaborate plan, which produces significant revenue for Oregon. Just because the tax is imposed at harvest, or that standing timber could be taxed in another way, does not mean that standing timber is not taxed. There is no evidence that Oregon timber owners benefit from the tax system at the expense of Carlines. Second, as in *Trailer Train California*, I find no reason to conclude there is "backdoor" discrimination in the exemption scheme. The scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid purpose.

If I assume that there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here, based on the above conclusions. In *Burlington Northern v. Bair*, 584 F.Supp 1229, 1237-38 (S.D. Iowa 1984), *aff'd in relevant part*, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted), the court found a 50% exemption impermissibly discriminatory. In *Trailer Train v. Leuenberger*, No. 87-L-29 (D. Neb. Filed Dec. 11, 1987), *aff'd* 885 F.2d 415 (8th Cir. 1988), the court found a 75% exemption impermissibly discriminatory.

I have found no cases, and Carlines have cited none, in which a court has found an exemption of approximately 30% impermissibly discriminatory. The burden is on Carlines to show impermissible discrimination. Carlines have not met that burden.

CONCLUSION

I grant Department's motion to supplement the record (#46). Carlines have standing to bring this action. Carlines have not met the burden of showing that the Oregon property taxation system

is impermissibly discriminatory under § 306 of the 4R Act. I grant judgment for Department.

DATED this 22 day of January, 1990.

[Signature omitted in printing]

APPENDIX C

49 U.S.C. § 11503

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) An assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assess-

ment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

APPENDIX D

Section 306 of the Railroad Revitalization and Regulatory Act of 1976

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the Constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the

parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of this section, except that—

(1) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other other commercial and industrial property cannot be established through the random-sampling method known as sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such

taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose distinct within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owed by the National Railroad Passenger Corporation.